Fujasa Property Sdn Bhd & Anor v Idaman Unggul Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02 (NCVC) (W)-19–01 OF 2014
DAVID WONG, HAMID SULTAN AND VERNON ONG JJCA
24 JUNE 2015

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Companies and Corporations — Shares — Financial assistance — Whether s 67(1) of the Companies Act 1965 breached — Whether agreement in breach of s 67(1) rendered null and void by s 24 of the Contracts Act 1950 or saved by s 67(6) of the Companies Act 1965

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The issue in the instant appeal was whether a settlement and assignment agreement ('SAA') between the respondents ('R1' and 'R2'), the first appellant ('A1') and a company named Fujasa Sdn Bhd ('FSB') contravened the financial assistance prohibition under s 67(1) of the Companies Act 1965 ('CA'); and, if so, whether the SAA was saved from being rendered null and void by s 67(6) of the CA. While s 67(1) prohibited a company from providing financial assistance for the purpose of, or in connection with, a purchase or subscription of its own shares or in any way purchasing, dealing in or lending money on its own shares, s 67(6) allowed a company in default (or any person) to recover the amount of any loan given, or any amount the company had become liable for either on account of any financial assistance given, or under any guarantee or in respect of any security provided, in breach of s 67. In the instant case, a company named Iktinuri entered into a share sale agreement ('SSA') with R2 to buy all of the latter's shares in FSB. FSB then entered into a joint-venture agreement with A1 under which A1 was to develop FSB's land in return for paying FSB RM5m and taking over FSB's RM13.2m debt. Following the JVA, the SAA was entered into under which A1 was to pay R1 the said RM5m and the RM13.2m. Another settlement agreement ('SA') was entered into between R1, R2, FSB and Iktinuri under which Iktinuri was to remit to R1 the liabilities of FSB it had assumed under the SSA. The combined effect of the SAA and the SA was to fully discharge Iktinuri of its obligations under the SSA, including the obligation to pay R2 RM5 for the purchase of the shares. In an action by the appellants for a declaration that the SAA contravened s 67(1) of the CA, the High Court ruled there was no evidence financial assistance had been given; that even if s 67(1) was infringed, the SAA was not rendered null and void. The High Court allowed the respondents' prayer to declare the SAA valid and enforceable but refused an order that A1 pay R1 RM14.2m with interest. In their instant appeal against the decision, the appellants maintained that the purpose of the SAA was to channel FSB's share of income from the development of its land by A1 to satisfy Iktinuri's obligations under the

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agreement; that this depleted FSB's shares as the proceeds from the development of its land were used to pay the respondents for their shares. R1 cross-appealed for an order compelling A1to pay it RM14.2m with interest.

Held, dismissing the appeal and allowing the cross-appeal with costs of RM40,000:

(1) Taking the facts in totality, there was no evidence to suggest Iktinuri actually paid for the shares under the share sale agreement. The evidence indicated that under the settlement and assignment agreement, the proceeds from the development of FSB's land, instead of accruing to FSB, were to be used to finance Iktinuri's obligations under the share sale agreement (see para 53).

(2) The diversion of FSB's share of the income from the development of its land under the joint venture agreement had the ultimate effect of relieving Iktinuri from meeting its payment obligations under the share sale agreement. In other words, Iktinuri got the shares but did not pay for them from its own resources. Instead, by the creation of a series of interconnected agreements, in particular the settlement and assignment agreement, FSB's own resources were used to finance the purchase of its own shares. As an added consequence, FSB's assets were depleted and indirectly returned to the respondents otherwise than by way of dividends. For those reasons, the High Court's findings were not consonant with the true nature of the settlement and assignment agreement (see paras 56–57).

(3) As s 67(6) of the CA allowed for recovery under an illegal contract, the operation of s 24 of the Contracts Act 1950 – which provided that every agreement of which the object or consideration was unlawful was void – was thereby excluded. Accordingly, the settlement and assignment agreement was not rendered null and void (see para 64).

(4) The first respondent was entitled to judgment for RM14.2m being the balance owing to it by the first appellant under the settlement and assignment agreement. The first appellant undertook to pay the first respondent a total of RM18.2m (the RM5m plus FSB's liabilities of RM13.2m) out of which, the evidence showed, it had only paid RM4m (see paras 68–69).

[Bahasa Malaysia summary

Isu dalam rayuan ini adalah sama ada perjanjian penyelesaian dan penyerahhakkan ('SAA') antara responden-responden ('R1' dan 'R2'), perayu pertama ('A1') dan satu syarikat yang dikenali sebagai Fujasa Sdn Bhd ('FSB') bercanggah dengan larangan bantuan kewangan di bawah s 67(1) Akta Syarikat 1965 ('AS'); dan, sekiranya ya, sama ada SAA terselamat daripada diisytiharkan sebagai terbatal dan tidak sah di bawah s 67(6) AS. Seksyen 67(1)

melarang sesebuah syarikat daripada memperuntukkan bantuan kewangan, bagi tujuan, atau berkenaan dengan, pembelian atau pengambilan sahamnya sendiri atau dalam apa-apa cara membeli, mengurus atau meminjamkan wang bagi sahamnya, tetapi s 67(6) membenarkan sesebuah syarikat yang ingkar (atau mana-mana orang) untuk mendapatkan semula jumlah pinjaman yang diberi, atau apa-apa jumlah yang ditanggung oleh syarikat bagi sama ada akaun mana-mana bantuan kewangan diberikan atau di bawah mana-mana jaminan atau berkenaan dengan cagaran yang diperuntukkan, melanggar s 67. Dalam kes ini, sebuah syarikat yang dikenali sebagai Iktinuri memasuki satu perjanjian pembelian saham ('SSA') dengan R2 untuk membeli kesemua saham R2 dalam FSB. FSB memasuki perjanjian usaha sama ('JVA') dan mengambil alih hutang FSB sebanyak RM13.2 juta. Berikutan JVA tersebut, SAA dimeterai di mana A1 perlu membayar RM5 juta dan RM13.2 juta kepada R1. Satu lagi perjanjian penyelesaian dimeteri antara R1, R2 dan FSB dan Iktinuri di bawah mana Iktinuri perlu mengembalikan kepada R1 semua tanggungjawab FSB yang dipegang di bawah SSA. Kesan gabungan SAA dan SA adalah melepaskan Iktinuri daripada kewajipannya di bawah SSA, termasuk kewajipan untuk membayar RM5 juta kepada R2 bagi pembelian saham. Dalam tindakan oleh perayu-perayu bagi satu perisytiharan bahawa SAA bercanggah dengan s 67(1) AS, Mahkamah Tinggi memutuskan bahawa tiada keterangan bantuan kewangan yang diberikan; bahawa jika pun s 67(1) dilanggar, SAA bukanlah terbatal dan tidak sah. Mahkamah Tinggi membenarkan permohonan responden-responden untuk mengisytiharkan SAA sah dan boleh dikuatkuasakan tetapi menolak satu perintah agar A1 membayar RM14.2 juta berserta faedah kepada R1. Dalam rayuan terhadap keputusan tersebut, perayu-perayu menghujahkan bahawa tujuan SAA adalah untuk menyalurkan pendapatan saham FSB daripada pembangunan tanahnya oleh A1 untuk memenuhi kewajipan Iktinuri di bawah perjanjian tersebut; bahawa ini mengurangkan saham FSB kerana hasil pembangunan tanah digunakan untuk membayar responden-responden bagi saham mereka. R1 merayu balas bagi satu perintah memaksa untuk membayar RM14.2 juta dengan faedah kepada A1.

Diputuskan, menolak rayuan dan membenarkan rayuan balas dengan kos sebanyak RM40,000:

(1) Mengambil kira keseluruhan fakta, tiada keterangan yang mencadangkan bahawa Iktinuri sebenarnya membayar saham di bawah SAA. Keterangan menunjukkan bahawa di bawah SAA, hasil daripada pembangunan tanah FSB, yang sepatutnya terakru kepada FSB, digunakan untuk membiayai kewajipan Iktinuri di bawah SAA (lihat perenggan 53).

(2) Pengalihan saham pendapatan FSB daripada pembangunan tanah di bawah perjanjian usaha sama mempunyai kesan muktamad yang melepaskan Iktinuri daripada memenuhi kewajipan bayaran di bawah

SAA. Dalam kata lain, Iktinuri mendapat saham tetapi tidak membayarnya daripada sumber sendiri. Sebaliknya, dengan mewujudkan satu siri perjanjian yang saling berkaitan, khususnya SAA, sumber FSB sendiri digunakan untuk membiayai pembelian sahamnya sendiri. Sebagai akibat tambahan, aset FSB telah habis dan secara tidak langsung kembali kepada responden selain daripada dengan cara dividen. Bagi sebab-sebab itu, dapatan Mahkamah Tinggi tidak selari dengan sifat sebenar SAA (lihat perenggan 56–57).

(3) Oleh kerana s 67(6) AS membenarkan pengembalian semula di bawah kontrak yang menyalahi undang-undang, operasi s 24 Akta Kontrak 1950 – yang memperuntukkan bahawa setiap perjanjian yang mana objek atau balasannya menyalahi undang-undang adalah tidak sah – telah, dengan itu, dikecualikan. Oleh itu, SAA tidak terbatal dan tidak sah (lihat perenggan 64).

(4) Responden pertama berhak mendapat penghakiman bagi jumlah RM14.2 juta merupakan baki yang terhutang kepadanya oleh perayu pertama di bawah SAA. Perayu pertama bersetuju untuk membayar RM18.2 juta kepada responden pertama (RM5 juta ditambah dengan liabiliti RM13.2 juta) yang daripadanya, bukti menunjukkan bahawa ia hanya membayar RM4 juta (lihat perenggan 68–69).]

Notes

For cases on financial assistance, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1077–1084.

Cases referred to

Belmont Finance Corporation v Williams Furniture Ltd and others (No 2) [1980] 1 All ER 393, CA (refd)

Burton v Palmer (1980) 5 ACLR 481, CA (refd)

Charterhouse Investment Trust Ltd and others v Tempest Diesels Ltd [1986] BCLC 1, Ch D (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356, SC (refd)

Co-operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313, FC (refd)

Dempster v National Companies and Securities Commission (1993) 10 ACSR 297, SC (refd)

E H Dey Pty Ltd (In Liquidation) v Dey [1966] VR 464, SC (refd)

Juniper Pty Ltd v Grausom (1983) 8 ACLR 212; (1983) 1 ACLC 1342, SC (refd)

Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485; [1990] 1 MSCLC 90, SC (refd)

Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 3 AMR 3161, FC (refd)

Merchant Credit Pte Ltd v Industrial & Commercial Realty Co Ltd [1983] 1 MLJ 124, PC (refd)
NP Sinnasamy v Hup Aik Omnibus Co [1952] 1 MLJ 36, CA (refd)
National Mutual Royal Bank Ltd, Re (1990) 3 ACSR 94, SC (refd)
Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors [1999] 5 MLJ 421, HC (refd)
Utama Wardley Bhd & Anor v Lenggang Laut Development Sdn Bhd & Ors [1991] 3 MLJ 490; [1991] 3 CLJ 2233, HC (refd)
VGM Holdings, Limited, Re [1942] Ch 235, CA (refd)
Victor Battery Company, Limited v Curry's Limited And Others [1946] Ch 242, Ch D (refd)
Wallersteiner v Moir; Moir v Wallersteiner and others [1974] 3 All ER 217; [1974] 1 WLR 991, CA (refd)
Yap Sing Hock Holdings Bhd & Ors v Chuah Teong Hooi & Ors [1989] 2 MLJ 503, HC (refd)

Legislation referred to

Companies Act 1965 ss 67, 67(1), (2)(a), (2)(b), (2)(c), (3), (6), 67A, 132, 133, 133(1)
Companies Act 1929 [UK] s 45(1)
Contracts Act 1950 s 24
National Land Code

Appeal from: Civil Suit No 22NCVC-718–06 of 2012 (High Court, Shah Alam)

Gopal Sri Ram (Lim Choon Kim and Simon Murali with him) (Lio & Partners) for the appellants.
Mohaji bin Selamat (Moor Hazury Mohd Zubir with him) (Mohaji, Hazury & Ismail) for the respondents.

Vernon Ong JCA:

[1] In the suit filed by the plaintiffs in the High Court at Shah Alam, the plaintiffs are claiming for, inter alia, a declaration that the settlement and assignment agreement dated 30 August 2006 is null and void for being in contravention of s 67 of the Companies Act 1965 ('CA 1965'). The learned trial judge found that there was no financial assistance infringing s 67 of the Act. The learned trial judge also held that even if it is found to have infringed the said section, it would not render the settlement and assignment agreement null and void; the civil aspects of the transaction are preserved but it will expose the directors to penal sanctions. The defendants' counterclaim was allowed and it was declared that the settlement and assignment agreement was valid and enforceable.

[2] The plaintiffs have appealed against the decision of the learned trial judge. The defendants have also cross-appealed for an order to compel the first plaintiff to pay RM14.2m together with interest. In this judgment the parties shall be referred to as they were in the High Court suit.

BRIEF ACCOUNT OF THE SALIENT FACTS

[3] Fujasa Sdn Bhd ('FSB') is in the business of property development. FSB was at the material time the owner of a piece of land in Penang ('the land').

[4] The second defendant Idris Hydraulic Properties Sdn Bhd ('IHPSB') was at the material time the sole shareholder of FSB.

[5] Pursuant to a share sale agreement dated 17 January 2006 ('the share sale agreement'), IHPSB agreed to sell all its shares in FSB to Iktinuri Development Sdn Bhd ('Iktinuri'). The salient terms include the following:

(a) Iktinuri to pay IHPSB a nominal sum of RM2;

(b) Iktinuri shall assume all of FSB's liabilities amounting to RM31.3m as set out in the second schedule;

(c) Iktinuri to deposit RM500,000 ('the deposit sum') with IHPSB as stakeholder;

(d) the deposit sum shall be deducted (from IHPSB's entitlement of RM5m) in five equal instalments within 15 months from the date of full settlement by Iktinuri of all the liabilities as stated in the second schedule and upon obtaining a complete discharge from the creditors listed therein; and

(e) Iktinuri shall commence construction work of the mixed commercial and/or residential development proposed to be undertaken by FSB on the land upon the successful completion of the share sale agreement ('the proposed development') within six months from the date of obtaining the commencement of work order from the local authorities.

[6] On 4 May 2006, FSB entered into a joint venture agreement ('the joint venture agreement') with the first plaintiff Fujasa Property Sdn Bhd ('FPSB') under which FSB allowed FPSB to develop the land. It was, inter alia, agreed that:

(a) FSB shall be entitled to receive RM5m towards which a sum of RM500,000 has been deposited with FSB prior to the execution of the joint venture agreement (cl 6.1.1); and

(b) FPSB shall assume all of FSB's liabilities referred to in the fourth schedule which shall be settled by FPSB within 36 months from the date

of commencement of work of the proposed development (cl 6.1.2). The fourth schedule is identical to the second schedule of the share sale agreement.

[7] Subsequently, two different sets of agreements were entered into on 30 August 2006. The first agreement is a settlement and assignment agreement ('settlement and assignment agreement') between the first defendant Idaman Unggul Bhd ('IUB'), IHPSB, FSB and FPSB. It was agreed that FPSB shall pay to IUB the RM5m together with the 'Assumed Liabilities' of RM13.2m (RM10.9m owing to Co-Operative Central Bank Ltd and RM2.3m owing to KFC Holdings (M) Bhd).

[8] The second agreement is a settlement agreement ('settlement agreement') entered into between IUB, IHPSB, FSB and Iktinuri. It was made with the intention of procuring the settlement of Iktinuri's obligations under the share sale agreement, in particular the RM5m due to IHPSB qua vendor and the said assumed liabilities.

[9] It is provided that the purpose of the settlement agreement is for Iktinuri to remit the assumed liabilities directly to IUB in consideration of IUB procuring IHPSB and Idris Hydraulic (M) Bhd to waive the inter-company debts owing by FSB to IHPSB and Idris Hydraulic (M) Bhd.

[10] The combined effect of two agreements dated 30 August 2006 is such that payment of the amounts due under the settlement and assignment agreement would constitute a good discharge of Iktinuri's obligation under the share sale agreement.

ESSENCE OF FINANCE ASSISTANCE PROHIBITION UNDER S 67(1) OF THE CA 1965

[11] In essence, s 67 of the CA 1965 deals with the prohibition on a company providing financial assistance for the purpose of or in connection with a purchase or subscription of its own shares or in any way purchasing, dealing in or lending money on its own shares.

[12] The prohibition is consistent with the principle that the share capital of the company once raised must be maintained so that a company may not purchase its own shares (s 67A), or refund to its members moneys paid for their shares (*NP Sinnasamy v Hup Aik Omnibus Co* [1952] 1 MLJ 36), or convert equity capital into a loan and then purport to repay the loan (*Merchant Credit Pte Ltd v Industrial & Commercial Realty Co Ltd* [1983] 1 MLJ 124 (PC)).

[13] Subsection (1) of s 67 of the CA 1965 which deals with the financial

assistance prohibition reads as follows:

> 67 Dealing by a company in its own shares, etc.
>
> (1) Except as is otherwise expressly provided by this Act no company shall give, *whether directly or indirectly* and whether by means of a loan, guarantee or the provision of security *or otherwise, any financial assistance* for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares. (Emphasis added.)

[14] The rationale for the prohibition of any financial assistance to purchase a company's own shares was described by Lord Greene MR in *Re VGM Holdings, Limited* [1942] Ch 235 (CA) at p 239 in the following manner:

> Those whose memories enable time to recall what had been happening after the last war for several years will remember that a very common form of transaction in connection with companies was one by which persons – call them financiers, speculators, or what you will – finding a company with a substantial case balance or easily realisable assets such as a war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments.

[15] The provision of financial assistance is frowned upon as it is expected that those who purchase shares in a company should do so from their own resources; they should not resort to the company's own resources. This practice has also been criticised as it may dissipate a company's assets to the detriment of the financial position of the company and is prejudicial to the interests of the shareholders.

[16] In *Burton v Palmer* (1980) 5 ACLR 481, Hutley J laid down the proposition that 'a transaction by a company cannot constitute the giving of financial assistance unless the transaction involves some diminution of the financial resources of the company'. This proposition was rejected by McPherson SPJ in *Re National Mutual Royal Bank Ltd* (1990) 3 ACSR 94 at p 101 (SC) (Queensland) who opined that it does not necessarily follow that because there is no such diminution there has been no financial assistance. The decision of McPherson SPJ was preferred by the Supreme Court, WA in *Dempster v National Companies and Securities Commission* (1993) 10 ACSR 297.

[17] There are, however, three exceptions to this prohibition. Briefly stated, the first exception relates to the shares of a company whose ordinary business is money lending (s 67(2)(a)); the second relates to a scheme whereby financial

assistance is provided by a company for shares to be held by trustees for the benefit of employees (s 67(2)(b)); and the third instance is where financial assistance is given by a company to its employees to purchase its fully-paid shares (s 67(2)(c)).

WHAT IS THE MEANING OF 'FINANCIAL ASSISTANCE'?

[18] A plain reading of s 67 of the CA 1965 indicates that the words 'financial assistance' is widely construed. This may be inferred by the provision that the giving of financial assistance may be 'whether directly or indirectly'; and the means by which it may be given such as a loan, guarantee or provision of security 'or otherwise'.

[19] There are two components to the meaning of financial assistance within the scope of s 67 of the CA 1965. In the first instance, there must be some financial assistance given by the company. Secondly, the financial assistance should be given 'for the purpose of or in connection with' the purchase of the company's shares.

[20] In determining whether or not there was any financial assistance in the sense prohibited under s 67, the courts have adopted a practical approach in the construction of the meaning of financial assistance in the light of the commercial realities of the transaction.

[21] In *Charterhouse Investment Trust Ltd and others v Tempest Diesels Ltd* [1986] BCLC 1 Hoffmann J said at p 11:

> The words (giving financial assistance) have no technical meaning and their frame of reference is in my judgment the language of ordinary commerce. One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it.

[22] In *Wallersteiner v Moir; Moir v Wallersteiner and others* [1974] 3 All ER 217; [1974] 1 WLR 991 (CA) at p 1014, Lord Denning described how financial assistance may have been given in the following words:

> You look to the company's money and see what had become of it. You look to the company's shares and see into whose hands they have got. You will then see if the company's money has been used to finance the purchase.

[23] As there are multifarious ways in which such financial assistance may be provided, it would be instructive to review some cases by way of illustration.

[24] In *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356, a company bought shares in the hotel using a loan from a bank on the security of the hotel's land. The Supreme Court held that there was financial assistance which was prohibited under s 67 of the CA 1965.

[25] In *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485; [1990] 1 MSCLC 90, at p 402, shareholders in a company owing land transferred their shares to a developer. It was agreed that the developer would build houses on the land and transfer some of the houses to the shareholders. The developer financed the development by charging the company's land to a finance company. As the developer failed to deliver on its promise, the shareholders sued and obtained judgment under the contract. The developer appealed and argued that the transaction was in breach of s 67(1). The Supreme Court held that the arrangement to fund the building and transfer of the houses amounted to financial assistance within the meaning of s 67(1).

[26] In *Utama Wardley Bhd & Anor v Lenggang Laut Development Sdn Bhd & Ors* [1991] 3 MLJ 490; [1991] 3 CLJ 2233, the company gave a negative pledge to a bank which was financing a purchaser to acquire its shares in the company. Pursuant to the pledge, the company deposited the title deeds to its land with the bank. The court held that there was no financial assistance as the negative pledge and the deposit of the title deeds by the company was not by way of security; it being merely an assurance by the company that it would not encumber its assets without prior consent of the bank.

[27] In *Yap Sing Hock Holdings Bhd & Ors v Chuah Teong Hooi & Ors* [1989] 2 MLJ 503, the purchaser created a debenture over its existing and future assets in favour of a bank to obtain finance to acquire shares in three other companies. As the debenture would also include the future assets of the purchaser in the three companies whose shares were being acquired, it was contended that this amounted to financial assistance. However, the court held that this did not constitute financial assistance as it was not the companies that created the debenture but the purchaser.

[28] In *Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors* [1999] 5 MLJ 421, the plaintiff, and the first and second defendants entered into a lease-back agreement. Under the agreement, the second defendant would transfer, among others, all his shares in the plaintiff to the first defendant and settle in full all outstanding loans and liabilities of the plaintiff, in consideration that the plaintiff would transfer its assets as enumerated in a schedule, a lease of land and the tenancy of its office to the second defendant. The second defendant would, thereafter, lease-back the assets, and assign and transfer the tenancy back to the plaintiff. The first defendant having gained

control of the plaintiff, entered into a sublease agreement with the third defendant. Under the sublease agreement, the third defendant would pay the plaintiff monthly rental and electricity and water charges in consideration to the plaintiff for subletting a portion of its business premises. The plaintiff's claims, as against the first defendant, as director and trustee of the company, an account of all monies received under the sublease agreement and payment of all sums received and found due after the taking of the account, and as against the second defendant, as constructive trustee, similar account and payment of all sums found due from the second defendant to the plaintiff. Alternatively, the plaintiff's claim against the first, second and third defendants for damages for conspiracy to injure. In addition, the plaintiff contended that the agreement was in contravention with s 67. The second defendant, however argued that the agreement fell within the exception in s 67(2)(c) which permits for the giving of financial assistance by a company to its employees to purchase fully-paid shares in the company.

[29] In that case the court found that the first defendant had breached his duties as a director under s 132 of the CA 1965 and as a fiduciary of the plaintiff because he had taken the monies paid by the third defendant for the subrentals and the electricity charges and that he did not account at all to the plaintiff. Under the agreement, the first defendant had received shares in the plaintiff by transferring the company's assets to the second defendant. This is a clear case of fraud on the company by its director. There was a depletion of monies due to the company when monies were paid out to the second defendant and a depletion of the company's assets when the assets were transferred to the second defendant, and thereafter, by them being leased back to the company for which payments were made. The court found that it was a cleverly planned subterfuge to deplete the assets of the company; there was no financial assistance to the employees of the company to buy into the shares of the company.

[30] In *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485 (SC), a company, Chen Hua Development (M) Sdn Bhd was the registered owner of a piece of land known as Taman Hilltop. The vendors of the shares in Chen Hua Development entered into a joint venture agreement with Kidurong Land Sdn Bhd, a housing developer, whereby the vendors transferred their shares to Kidurong for RM3.8m; the consideration to be paid in kind by the transfer of certain specified units of houses to be constructed on Taman Hilltop. Kidurong had agreed to develop Taman Hilltop. The issue for determination before the Supreme Court was whether the joint venture agreement to develop Taman Hilltop had infringed s 67(1) in that the transfer of the shares in Chen Hua to Kidurong was financed by Chen Hua by charging the Taman Hilltop land; the land which is Chen Hua's asset. The Supreme Court held that the provisions of s 67 is very wide – the financial assistance can be direct or indirect. Kidurong had used all the money it obtained from the

charge of Chen Hua's land for the projects, ie to build the houses and that the payments of the shares was to be by the transfer of part of the project. The Supreme Court found that the funding of the project which in effect is the funding of the houses to be transferred is any direct or indirect financial assistance and as such is a breach of s 67.

[31] In *Belmont Finance Corporation v Williams Furniture Ltd and others (No 2)* [1980] 1 All ER 393 (CA), the Court of Appeal held that there was financial assistance where a company purchased property from a person at an inflated price with the sole purpose of enabling that person to purchase the company's shares. Buckley LJ, speaking for the Court of Appeal said at p 403:

> It was an exceptional and artificial transaction and not in any sense an ordinary commercial transaction entered for its own sake in the commercial interests of Belmont. It was part of a comparatively complex scheme for enabling Mr. Grosscurth and his associates to acquire Belmont at no cash cost to themselves, the purchase being found not from their own funds or by the realisation of any asset of theirs (for Maximum continued to be part of their group of companies) but out of Belmont's own resources.

CONSEQUENCES OF BREACH OF FINANCIAL ASSISTANCE PROHIBITION

[32] Both criminal and civil consequences flow from a breach of the prohibition.

[33] Briefly, criminal consequences fall on the officers of the company in default; the company is not liable as the law recognises it as the victim of the breach. Under s 67(3) each officer who is in default is liable to a fine of up to RM100,000 or five years imprisonment or both.

[34] Civil consequences are governed by sub-s (6) of s 67. Subsection (6) was amended by the Companies (Amendment) (No 2) Act 1992 came into effect on 10 September 1992. According to the unamended version, it was provided that 'the company' was not prevented from recovering the amount of any loan made in breach of s 67.

[35] Subsection (6) of s 67 was amended by the insertion of the words 'or any person' after the words 'the company'. The amended sub-s (6) is as follows:

> Nothing in this section shall operate to prevent the company [or any person] from recovering the amount of any loan made in connection of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[36] In *Hotel Rasa Sayang*, the Supreme Court held that a transaction made in breach of the financial assistance prohibition would be null and void under s 24 of the Contracts Act 1950. The Supreme Court held that the words 'the company' referred to the company itself which had provided the financial assistance and the meaning of the words did not include a third party – the lender in that case. The Supreme Court in *Kidurong*, also arrived at the same conclusion that an agreement which contravenes s 67 is void and unenforceable under s 24 of the Contracts Act 1950.

[37] Subsequently, sub-s (6) also came to be considered in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 3 AMR 3161 (FC) where the Federal Court departed from the Supreme Court's approach in *Hotel Rasa Sayang*. It is pertinent to observe that even though *Lori*, was decided after the amendment of sub-s (6) of s 67 of the CA 1965, the Federal Court did not apply the amended sub-s (6) because the impugned financial assistance occurred prior to the date the amendment took effect.

[38] In *Lori*, the High Court had granted an order for the sale of land which was charged by way of security by Lori (M) Bhd ('Lori') in favour of Arab-Malaysian Finance Bhd ('AMFB') for a loan pursuant to the National Land Code. Lori was originally owned by Majlis Amanah Rakyat ('MARA'). MARA had appointed Technivest Sdn Bhd to manage Lori. Later MARA offered to sell its shares in Lori to Technivest. Technivest applied to AMFB for a term loan of RM4.3m. Technivest informed AMFB that the purpose of the loan was to pay MARA for the settlement of Lori's liabilities with MARA and its subsidiaries. AMFB required a charge over the land owned by Lori as part of the security for the loan facility. However, this offer was revoked as the proceeds of the loan provided by AMFB would be used by Technivest to purchase the shares owned by MARA in Lori; as such it would fall foul of the financial assistance prohibition under s 67. Subsequently, Lori applied to AMFB for a fresh loan facility. By that time the shares in Lori had already been transferred to Technivest. AMFB required a charge of the land owned by Lori as security for the loan facility. The charge and loan facility agreement were executed on 11 October 1990. Eventually Lori defaulted in the repayment of the loan and AMFB applied to the High Court to enforce the charge. At the High Court, Lori, through its interim receiver, contended that the charge was unenforceable as it contravened the financial assistance prohibition under s 67 of the CA 1965. Lori's argument was rejected and the High Court granted an order for sale in favour of AMFB. Lori appealed to the Federal Court arguing that the High Court erred in holding that the loan facility arrangements did not contravene the financial assistance prohibition. The Federal Court dismissed the appeal.

[39] The Federal Court in *Lori*, took the position that *Hotel Rasa Sayang*, was

decided per incuriam because the Supreme Court failed to actually construe the words 'for which it becomes liable' in sub-s (6) and placed undue stress on the provisions of s 24 of the Contracts Act 1950 and held that because the bank had knowledge of the illegality and the nature of the transaction at the material time, the bank's claim failed. The Federal Court took the view that sub-s (6) creates an important exception to s 24 of the Contracts Act 1950 by allowing recovery under an illegal contract, thereby excluding the operation of s 24. Subsection (6) was enacted for the protection of the company's funds and the interests of shareholders as well as creditors and the general public. The Supreme Court in *Hotel Rasa Sayang*, had been unduly swayed by certain English cases as the relevant legislation on which they were decided did not have an equivalent sub-s (6) saving provision. Another difference was that the prohibition under the relevant English legislation imposed criminal liability not only on officers of the company but also the company itself, whereas under s 67, criminal liability is only imposed on officers of the company. The Federal Court also held that sub-s (6) of s 67 appears to be a statutory recognition of the rule in *Victor Battery Company, Limited v Curry's Limited And Others* [1946] Ch 242 where it was decided that an illegal security given by a company to finance the purchase of its own shares contrary to s 45(1) of the Companies Act 1929 (UK) (being the equivalent to our s 67(1) of the CA 1965) was not avoided. The Federal Court noted, however, that the Companies Act 1929 (UK) did not have a provision equivalent to our sub-s (6) of s 67; and added that even if *Victor Battery* was wrongly decided, it matters not for the principle enunciated therein had been statutorily recognised in sub-s (6) of s 67.

ISSUES FOR DETERMINATION

[40] In this appeal, the principal issues for determination relates to the question of whether the settlement and assignment agreement contravenes the financial assistance prohibition under s 67(1); and if so, whether by virtue of sub-s (6) of s 67 the settlement and assignment agreement is not rendered null and void.

Whether the settlement and assignment agreement contravenes s 67(1) of the CA 1965?

[41] In this case there are four separate agreements and they are as follows:

(a) share sale agreement between IHPSB and Iktinuri;

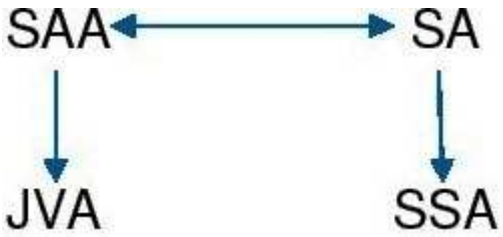
(b) joint venture agreement between FSB and FPSB;

(c) settlement and assignment agreement between IUB, IHPSB, FSB and FPSB; and

(d) settlement agreement between IUB, IHPSB, FSB and Iktinuri.

[42] Is there any evidence to suggest that these four agreements are interrelated and or forms part of an overall scheme of arrangement? To answer this question, it is necessary to peruse the agreements in question.

[43] For a start, Recital A of the settlement and assignment agreement makes reference to the joint venture agreement. Secondly, both the settlement and assignment agreement and the settlement agreement makes mutual reference to each other in Recitals D and C respectively. Thirdly, and more significantly, Recital A of the settlement agreement makes reference to the share sale agreement. In short, the four agreements are interconnected; the diagram below illustrates the connection between the agreements.



[44] The settlement agreement and the settlement and assignment agreement also share identical provisions vide cl 2.1 whereby it is stated that Iktinuri shall remit the assumed liabilities directly to IUB in consideration of IUB procuring IHPSB and Idris Hydraulic (M) Bhd to waive the intercompany debts owing by FSB to IHPSB and Idris Hydraulic (M) Bhd.

[45] The common thread that runs through all the four agreements is the reference to the deposit sum of RM500,000 and the assumed liabilities in the agreements.

[46] Learned counsel for the plaintiff that the assumed liabilities (for the purposes of the present appeal, only two items in the second schedule of the share sale agreement are pertinent – (i) RM10.9m due to Co-operative Central Bank Ltd, and (ii) RM2.3m due to KFC Holdings (M) Bhd) although described as FSB's liabilities in the share sale agreement was in fact an amount payable by IHPSB to the respective creditors. These liabilities were subsequently absorbed by IHPSB's ultimate holding company, namely IUB in a debt restructuring exercise. At the material time, FSB was the wholly owned subsidiary of IHPSB. This fact is borne out by the evidence-in-chief of DW1.

[47] Learned counsel for the plaintiff submitted that the object of the settlement and assignment agreement was to channel FSB's share of income from the development of the land under the joint venture agreement to satisfy

the amount which would otherwise had to be paid by Iktinuri to IUB in discharge of Iktinuri's obligations under the settlement and assignment agreement. As a consequence, the assets of FSB would be depleted.

[48] Learned counsel also argued that in essence FSB had funded the development of its land the proceeds of which were to be conveyed to IUB and IDPSB in payment for their shares. As such, the settlement and assignment agreement was to deplete FSB's assets and to return the assets to IUB and IHPSB otherwise than by way of dividends.

Decision

[49] Under the share sale agreement, Iktinuri agreed to purchase all of FSB's shares from IHPSB; as consideration Iktinuri, inter alia, agreed to pay the deposit sum and assume the assumed liabilities. The first part of the obligation was fulfilled because Iktinuri paid the deposit sum to IHPSB; Iktinuri's cheque dated 11 January 2006 was presented for payment on 17 January 2006. What remains unfulfilled is Iktinuri's obligation to assume FSB's liabilities as set out in the second schedule.

[50] Under the joint venture agreement, FSB as the owner of the land agreed to FPSB developing the land; whereby in consideration thereof FPSB agreed to pay the deposit sum to FSB (described as 'owner's entitlement') and to assume the assumed liabilities. It appears that IHPSB was persuaded by Iktinuri to enter into the joint venture agreement; Iktinuri's intentions may be discerned in two letters dated 3 May 2006 and 14 July 2006 issued by Iktinuri to IHPSB. It is pertinent to note that FPSB and FSB are part of the Ideal Group of companies headed by one Alex Ooi; this fact is borne out in SP1's testimony under cross-examination.

[51] Under the settlement agreement, Iktinuri agreed to remit the deposit sum and assumed liabilities to IUB.

[52] However, under the settlement and assignment agreement of even date FPSB now agrees to pay to IUB the deposit sum and assumed liabilities. Significantly, FPSB assigns the proceeds from the development of the land as security for the due payment of the said sums to IUB. In fact, there is evidence to show that the deposit sum due under the joint venture agreement went to discharge part of the sale proceeds of the sale of the shares and that the sale proceeds were used to pay the assumed liabilities. IUB's letter dated 15 September 2011 indicates that most of the payments of the deposit sum/owner's entitlement were made by FPSB and Ideal Property Intelligence Sdn Bhd for Iktinuri (see RR(4) at p 432/5; PW1's evidence at CB(2) at p 66).

[53] Under the share sale agreement, Iktinuri agreed to purchase all of FSB's shares from IHPSB; as consideration Iktinuri, inter alia, agreed to settle the deposit sum and assumed liabilities.

[54] Under the joint venture agreement, FSB as the owner of the land agreed to FPSB developing the land; whereby in consideration FPSB agreed to pay the deposit sum to FSB (described as 'owner's entitlement') and to assume the assumed liabilities.

[55] Taking the above facts in totality, there is no evidence to suggest that Iktinuri actually paid for the shares under the share sale agreement. The evidence indicates that under the settlement and assignment agreement, the sale proceeds realised from the development of the FSB's land, instead of accruing to FSB, were to be used to finance Iktinuri's obligation under the share sale agreement.

[56] As the words 'giving financial assistance' have no technical meaning the commercial realities of the settlement and assignment agreement should be examined in order to ascertain whether it can properly be described as the giving of financial assistance by FSB.

[57] Applying the principles adverted to above, it cannot be gainsaid that the ultimate objective of the settlement and assignment agreement was to divert FSB's share of income from the development of the land under the joint venture agreement to satisfy the amount which would otherwise had to be paid by Iktinuri to IUB in discharge of Iktinuri's obligations under the share sale agreement. As a result of this sophisticated scheme, two consequences flowed – (i) the purchase consideration for FSB's shares would be paid for by FSB's assets, to wit, the proceeds of sale from the development of the land, and (ii) depletion of FSB's assets.

[58] The diversion of FSB's share of the income from the development of the land under the joint venture agreement had the ultimate effect of relieving Iktinuri from meeting its payment obligations under the share sale agreement. In other words, Iktinuri got the shares but it did not pay for the shares from its own resources. Instead, by the creation of a series of interconnected agreements, in particular the settlement and assignment agreement, FSB's own resources have been used to finance the purchase of its own shares. As added consequence of the settlement and assignment agreement, FSB's assets were depleted and indirectly returned to IUB and IDHP otherwise than by way of dividends.

[59] For the foregoing reasons, we do not agree with the learned trial judge whose findings are not consonant with the true nature of the settlement and

assignment agreement. Consequently, the question is answered in the affirmative. Accordingly, the court will now consider the question of whether the settlement and assignment agreement is void for illegality.

Whether the settlement and assignment agreement is void for illegality?

[60] Learned counsel for the plaintiffs submitted that the learned trial judge misdirected himself in holding that even if the settlement and assignment agreement infringed the financial provision prohibition, it would not render the settlement and assignment agreement void but it will expose the directors of FSB to penal sanctions citing *Co-operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 and *Lori*.

[61] In *Feyen*, CCB had given a loan to its member who was also a director of Feyen. Feyen had guaranteed the loan to its director and had also created two separate charges in favour of CCB as security. Upon default, CCB applied for orders of sale of the charged properties. Feyen resisted CCB's application on the ground that the charge transactions breached s 133(1) of the CA 1965 which forbids it from providing security for loans taken by its directors from third parties. The High Court ruled both transactions to be void and unenforceable in law. On appeal, the Federal Court held that a guarantee or security given in breach of s 133(1) prohibition is valid and not void. The Federal Court said that the court will not lend its aid to enable the charger to take advantage of its own default by relying on its own breach to avoid the charge transactions and thereby escape its obligations thereunder, unless this is what the clear language of the statute is thought to require. Section 133 is designed to protect the company, its shareholders and creditors from unlawful dissipation of its resources and ought to be given a purposeful approach. To admit the defence of illegality to a commercial transaction would defeat such purposive interpretation as it would defeat the chargee's application to enforce the charges by an order for sale but would provide 'a windfall gain' to the charger and others in a similar position. Even accepting that the charge transactions did breach s 133(1) of the CA 1965, no civil consequences flowed therefrom so that no voidness or unenforceability attached to the loan or the charge transactions.

[62] In *Lori*, a loan was given on the security of a charge over Lori's property for the purpose of enabling the purchaser to purchase Lori's entire share. In that case, the Federal Court held that the Lori's liability to AMFB both in respect of the land and the security remains unaffected on the ground that sub-s (6) of s 67 creates an important exception to s 24 of the Contracts Act by allowing recovery under an illegal contract, thereby excluding the operation of s 24.

[63] Learned counsel for the plaintiffs argued that *Lori* had nothing to do with sub-s 67(1) but with sub-s 67(6). He also argued that in *Lori* security had

been given and the question was whether the security was enforceable. Only the security was saved under sub-s 67(6) and not the transaction. This case had nothing to do with any loan, guarantee or security as in *Lori* . The transaction fell within the general rule of s 67 and not under any of the six exceptions.

[64] In *Lori*, the Federal Court opined that the trend shown by the courts in common law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one and should be followed thus incorporating it as part of our common law. The Federal Court also considered at length the question of whether sub-s 67(6) excludes the operation of s 24 of the Contracts Act 1950. The aforesaid question was considered by the Federal Court in the context of the general scheme of sub-s 67(1) upon which the question of illegality arose.

[65] According to the learned authors of Chan & Koh on *Malaysian Company Law Principles & Practice* (2nd Ed), at p 318, the words 'or otherwise' in sub-s 67(1) is not be construed *ejusdem generis* to loan, guarantee or security 'for the genus has already been stated, namely the giving of financial assistance' and the Legislature did not intend it to be narrowly construed (*Juniper Pty Ltd v Grausom* (1983) 8 ACLR 212 at p 214; (1983) 1 ACLC 1342 at p 1344). The words 'or otherwise' was construed as meaning 'in any other way' by McInerney J in the Australian case of *E H Dey Pty Ltd (In Liquidation) v Dey* [1966] VR 464 at p 469). In this light, sub-s 67(6) must be read in the context of sub-s 67(1) so as to give full effect to the intent of the Legislature. As such, the application of sub-s 67(1) and (6) is not restricted to a loan, guarantee or security but includes any form of financial assistance in any other way.

[66] Accordingly, we do not think that there is any merit to the proposition advanced by learned counsel for the plaintiffs. As sub-s 67(6) allows for the recovery under an illegal contract, the operation of s 24 of the Contracts Act 1950 which provides that every agreement of which the object or consideration is unlawful is void is thereby excluded. We are therefore constrained to hold that the settlement and assignment agreement is not rendered null and void.

THE DEFENDANTS' CROSS-APPEAL

[67] In the light of the foregoing, the court will now address the issue of the defendants' cross-appeal. After dismissing the plaintiff's claim, the learned trial judge allowed the defendant's counterclaim only insofar as it related to the declaration affirming the validity and enforceability of the settlement and assignment agreement. The defendant's cross-appeal relates to FPSB's liability to pay RM14.2m to the defendants.

[68] Learned counsel for the plaintiffs submitted that the learned trial judge had granted the declaration prayed in the defendants' counterclaim and that since they got what they asked for the cross-appeal is academic.

[69] With respect, we do not agree that the cross-appeal is academic. The defendants did not get their prayers for FPSB to pay the RM14.2m together with interest. As such they are entitled to pursue their counterclaim for RM14.2m in their cross-appeal.

[70] The claim for RM14.2m represents the balance due and owing under: (i) IHPSB's entitlement of RM5m (under cl 8.4), and (ii) FSB's liabilities of RM13.2m under the second schedule (cl 2.2(b)) under the settlement and assignment agreement. Pursuant to the settlement and assignment agreement and the joint venture agreement, the said liabilities in the aggregate of RM18.2m were assumed by FPSB to pay to IUB.

[71] According to the evidence adduced at the trial, between 2006 and 2011, the plaintiffs have made payments amounting to RM4m in part-payment of IHPSB's entitlement and FSB's liabilities. As such, there is an outstanding balance of RM14.2m due and owing to IUB under the settlement and assignment agreement which remains unsatisfied and undischarged by FPSB. Accordingly, IUB should be entitled to judgment on the said sum together with interest as prayed.

CONCLUDING REMARKS

[72] For the foregoing reasons, we dismiss the plaintiffs' appeal. The defendants' cross-appeal is allowed with costs. Judgment on the defendants' counterclaim is allowed in terms of prayers 84(a), (g), (h) and (i) of the statement of defence and counterclaim dated 18 January 2012. The decision of the High Court is affirmed. We award costs of RM40,000 to the defendants.

Appeal dismissed and cross-appeal allowed with costs of RM40,000.

Reported by Ashok Kumar